IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1184 OF 2003

Pritamlal Mohanlal Daftary .. ..Appellant
(Original Plaintiff)

Versus

Matruchhaya Building
Condominium & Ors. .. ..Respondents
(Original Defendants)

Mr.G.S.Godbole with Mr.S.K.Chinchlikar for appellant

Mr.K.A.Shah for Respondent Nos.1, 4 and 9.

CORAM : P.V.KAKADE, J.

DATE : 27TH JANUARY, 2005.

P.C.:

1. The appellant-plaintiff has filed this appeal against the Judgment and Order passed by the City Civil Court Judge in L.C.Suit No.479 of 1997 dismissing his suit for declaration and perpetual injunction against

the defendants.

2. Rule. By consent rule made returnable forthwith.

3. I heard the learned counsel for both sides and perused the entire record made available by both the parties.

4. The facts in dispute, in brief, are thus -

. The plaintiff filed the suit for declaration that he is in exclusive possession, occupation and enjoyment of the 7th floor terrace with Unit/Flat No.27 on the 7th floor of the "Matruchhaya" situated at 70 Marine Drive, Bombay 400 020 (hereafter referred to as the "suit building"). The plaintiff has also prayed for perpetual injunction against the defendants and members of the Defendant No.1 i.e. "Matruchhaya Building Condominium". The Defendant Nos.2 to 10 are members of the Matruchhaya Building Condominium which is formed under the Maharashtra Apartment Ownership Act, 1970 formed by Plaintiff, in the year 1994 prior to which the

plaintiff held the property. The flats/units in the said building were given by the plaintiff on rental basis to various persons who are now members of the Defendant No.1 Condominium. From the year 1996 plaintiff being landlord/owner of the suit building has been occupying Flat No.27 on the seventh floor with the entire terrace on the seventh floor.

. In the year 1994 there were negotiations regarding formation of Condominium and Agreement was executed on 18th July, 1994 for sale by the plaintiff in favour of various tenants whereby appellant agreed to sell individual flats to the tenants. Thereupon Deed of Declaration was executed on 11.11.1994 under Section 2 of the Maharashtra Apartment Ownership Act, 1976 wherein common areas and facilities as well as restricted areas were clearly mentioned by the parties. It is the case of the plaintiff that in the declaration dated 11.11.1994 the terrace of the 7th floor, which is the subject matter of the dispute, was not mentioned in the common areas and facilities, the said declaration dated 11.11.1994 is annexed to the Plaint. It was the case of the plaintiff that after the formation of Condominium the defendants started harassing the plaintiff under one

pretext or other. According to the plaintiff, few members of Condominium being former tenants of the plaintiff in order to harass him, called upon the plaintiff vide letter dated 25.12.1996 to construct the wall within one week from the receipt of the said letter, separating the restricted common area on the attached terrace on the 7th floor. The plaintiff was also warned that if he failed to carry out the construction work on the 7th floor, the Condominium would be constrained to construct a wall at the risk and costs of the plaintiff. It is further submitted by the plaintiff that since 1976 the plaintiff is in exclusive use, enjoyment and occupation of the flat No.27 on the 7th floor of the suit building and is in exclusive possession of the entire terrace on the 7th floor and there has never been any dividing wall on the terrace, and the plaintiff is in possession of the said terrace, as per Agreement dated 18.7.1994 and hence the suit for declaration and injunction came to be filed.

5. The defendants challenged the allegations made by the plaintiff by filing written statement wherein it was submitted that it is fact that agreement for sale was executed between the plaintiff and themselves in

July 1994. It is also admitted position that Condominium was formed under declaration dated 11.11.1994. It was further contended by the defendants that the 7th floor of the suit building was never in possession of the plaintiff when he was its owner and have denied plaintiff's exclusive ownership to the suit property. On such and other grounds the suit was sought to be dismissed with costs.

6. The learned trial judge raised various issues on the basis of these pleadings and adjudicated the dispute on the basis of documentary evidence by consent of the parties. No oral evidence was led by both the parties. It was held by the learned trial judge that the plaintiff had failed to prove that he was entitled to exclusive right to use, occupy and enjoy the entire terrace on the 7th floor of the suit building and as such he was not entitled either to declaration to that effect or to perpetual injunction as sought for. In the result the suit came to be dismissed. Hence the present appeal.

7. After hearing both the parties and perusing the

entire record including the pleadings, certain points arise for my consideration. The points and my findings thereon are as follows :

POINTS:	FINDINGS
(a) Whether the appellant-plaintiff has proved that he is in exclusive possession and is entitled to exclusive right to use, occupy and enjoy the entire terrace on the 7th floor of the suit building?	In the affirmative.
(b) Whether the plaintiff has proved that he is entitled to declaration and perpetual injunction against the defendants as prayed ?	In the affirmative.
(c) What order ?	As per final order below.

REASONS :

8. As noted earlier, both the parties did not lead oral evidence and the learned trial court adjudicated the suit on the documents as well as pleadings of both the parties. The plaintiff’s document of agreement dated 18.7.1994 as well as Declaration dated 11.11.1994 entered into between the plaintiff and the defendants are admitted by the defendants. The plaintiff also submitted the supplementary declarations dated 16.1.1997 and 28.11.1998 but both these documents were not admitted by the defendants and the learned trial judge thought it fit not to admit those documents in evidence for want of sufficient proof for the reasons mentioned in the judgment.

. In my considered view, the contents of the admitted documents are sufficient to decide the fate of the dispute, especially when there is no oral evidence on record. The agreement for sale dated 18.7.1994 is required to be considered, which is admittedly executed between the plaintiff on one hand and the defendants, who are erstwhile tenants, on the other hand. The

clauses 17 and 18 read thus -

> 17. It is clearly agreed between the parties hereto that the terrace attached to the said flat no.27 on the 7th floor will exclusively be in possession of the vendors and the purchaser/s and/or the said Association of Apartment Owners will not have any right to enter or stay in the said terrace or any part thereof, and shall be treated as a restricted area for exclusive usage by the vendors. However, with prior permission the Vendors shall permit at all reasonable times the Purchaser/s or his/her authorised representative and/or representatives of the Association of Apartment Owners to visit the attached terrace to put up and maintain TV Antena, to carry out repairs to the building and to inspect/maintain water tanks, pipelines valves etc. to ensure continuous supply of water. The Purchasers properties in the Vendors possession subject to the bye-laws of the Association of Apartment Owners and that the new owner will be bound by the provision for access to the attached terrace as agreed herein.

> 18. It is clearly agreed between the purchaser/s and the vendors that although the possession of the terrace attached to the flat no.27 is in exclusive possession of the vendors alone the Trustees/Managers of the Matruchhaya Residents' Association or the Association of Apartment Owners as the case may be will charge to the vendors, as and when the Deed of Apartment is executed in favour of the purchaser/s, only the proportionate maintenance charges on the covered area of the Flat no.27 (excluding the area of the complete terrace). However, the vendors will not be liable to pay for the maintenance charges of the terrace, three rooms on ground floor, three garages and one passage."

. Plain reading of these contents show that the terrace attached to the said flat no.27 on the 7th floor was exclusively in possession of the plaintiff and the erstwhile tenants the defendants agreed that they would have no right whatsoever to enter or stay in the said terrace or any part thereof, and it was to be treated as

restricted area for exclusive usage by the plaintiff. The clause also provided that the plaintiff would allowed the defendants only for the purpose of put up and maintain TV antena, carry out repairs of the building and to inspect/maintain water tanks, pipelines valves etc. to ensure continuous supply of water. Clause 18 also provides that even though the plaintiff was in exclusive possession and enjoyment of the terrace attached to the flat no.27 he would be charged proportionate maintenance charges on the covered area of flat no.27 (excluding the area of the complete terrace) and would not be charged for maintenance charges of the terrace and other areas which in his possession.

. This document was followed by declaration deed executed on 11.11.1994 under Section 2 of the Maharashtra Apartment Ownership Act, 1970. Restricted common areas and facilities provided in the said declaration are thus -

RESTRICTED COMMON AREAS AND FACILITIES

The following facilities and area are restricted common area and facilities to the Unit No.27 on

the seventh floor, which are continued and used by Grantors as follows:

(e1) Entrance on the terraces including on the 7th floor as shown in the plan.

(e2) A unit area forming part of the terrace on the 7th floor as shown on the plan.

(e3) One unnumbered unit consisting of three rooms and three garages.

Clause (e1) provides entrance on the terraces including on the seventh floor as shown in the plan. This aspect coupled with the fact that common areas and facilities mentioned in this declaration are conspicuously silent regarding mentioning of terraces. Therefore, it is clear that all the concerned parties to the declaration accepted the fact of common areas and facilities would not include the terraces which were in exclusive possession of the plaintiff, and the terraces were part of restricted common areas and facilities which were continued and used by grantor i.e. plaintiff.

. In the light of this aspect there is no doubt whatsoever that the plaintiff, who was owner/landlord of the entire building since 1974, was exclusivly in occupation of flat no.27 with terrace on 7th floor of the building and continued to be so even after the agreement dated 18.7.1994 and declaration under Section 2 of the Maharashtra Apartment Ownership Act, 1970 dated 11.1.1994, this fact was recognised by all the concerned tenants / members of the Condominium, who are party to the suit.

. Mr. Shah the learned counsel for the respondents vehemently urged that after making declaration and executing deeds of apartments the rights of parties under the act are solely governed by the said two documents and all agreements made prior thereto, if inconsistent, will give way to the provisions made in said two documents. He further submitted that otherwise also in law documents executed subsequently would prevail if the same are inconsistent with the prior documents. I prefer to disagree with this proposition. Firstly it must be noted that the agreement of July 1994 cannot be said to be inconsistent with subsequent

documents of declaration executed under the provisions of Maharashtra Apartment Ownership Act, and secondly, if we consider all the relevant documents collectively, those are found to be not only consistent with each other but are in continuation of the earlier agreement of July 1994 and therefore, there is no doubt whatsoever that plaintiff’s exclusive right and possession to the suit terrace, and right to protect such possession, is established.

9. It appears that much ado was sought to be made about the contents of copy of map Exh.11 showing description of terrace as "A" and "B". On the basis of this aspect the learned trial judge has observed that if there had been entire common terrace, the terrace would not have been demarcated as ‘A’ and ‘B’ and it would not have been mentioned as "attached terrace" in clause 16 in Agreement of Sale dated 18.7.1994. However, in my view, no importance can be given to such description, especially when restricted common areas in declaration dated 11.11.1994 in clause (e1) specifically describes the word "terraces" and not "terrace".

. The learned trial judge, in his judgment, has

referred to two documents sought to be produced by the plaintiff in support of his case i.e. supplementary declarations dated 16.1.1997 and 26.11.1998. However, these documents were not admitted by defendants, and were rejected by the court holding those were not proved. Inspite of this position the learned trial judge has not only referred to those two documents in his judgment but also relied upon the contents thereof in order to hold that act of the plaintiff is malafide. By any stretch of imagination, I fail to understand how the learned trial judge could refer to the contents of the documents, which were held inadmissible by him by giving reasons. Be as it may, the learned trial judge has not properly appreciated the entire evidence on record which is amply clear from his cryptic reasoning recorded while dismissing the suit.

10. For the reasons recorded above, I hold that the plaintiff has proved his case in toto and therefore is entitled to a decree as prayed for. Hence the appeal is allowed with costs. The judgment and order passed by the Lower Court is hereby set aside and the suit is hereby decreed in terms of prayer clauses (a) and (b) with modification of relief in prayer clause (b) to the

effect that for reasonable repairs and maintenance of the water tanks on the terrace and the slab forming base of the terrace or the parapet wall or the other fixtures, the defendants will have a limited right of entry on the terrace.

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